STATE OF MICHIGAN

COURT OF APPEALS

ALAN A. MAY, Personal Representative of the Estate of WANDA COTTRELL, Deceased, and ELEANOR DAVIS,

Plaintiffs-Appellees,

v

CITY OF DETROIT,

Defendant-Appellant.

UNPUBLISHED
June 12, 2003

No. 233318; 234966
Wayne Circuit Court
LC No. 98-825562-NI

Before: Jansen, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from an order awarding plaintiff[1] $5,250,000 and an order awarding $946.65 taxable costs and $213,800 attorney fees in case evaluation sanctions[2] in this automobile negligence and case evaluation sanctions case. We affirm.

Around 10:15 p.m. on August 1, 1998, James Braswell and Wanda Cottrell [hereinafter "decedent"] were crossing bumper-to-bumper traffic at Jefferson Avenue and Riopelle heading for a party store on the south side of Jefferson that was diagonal from their 1523 Somerset Apartment on East Jefferson, and were hit in the center turn lane by a patrol car driven by Detroit Police Officer Fred Scott. [3] Decedent flew up in the air, and landed on the ground. Braswell ended up through the windshield of the patrol car suffering a closed head injury and injuries to his arms and legs. Decedent died on August 25, 1998 as a result of injuries suffered in the accident.

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[1] It is unclear as to why Eleanor Davis remains a named party because on September 25, 1998 an order was entered, upon the filing of the suggestion of death, substituting Alan A. May as party plaintiff for Davis.

[2] Although at the time of the proceedings it was referred to as "mediation" under MCR 2.403, the current terminology will be used for clarity because the amendment does not impact the analysis.

[3] Braswell was decedent's fiancé.

Defendant's first issue on appeal is that a new trial is required because the trial court legally erred in interpreting MCL 257.10 of the Motor Vehicle Code. We disagree.

It is difficult to ascertain from defendant's brief on appeal whether defendant is arguing instructional error, or arguing that the trial court made an erroneous evidentiary ruling. Defendant appears to be arguing instructional error. To preserve an instructional issue for appeal, a party must request the instruction before instructions are given and must object on the record before the jury retires to deliberate. MCR 2.516(C), *Hunt v Deming*, 375 Mich 581, 584-585; 134 NW2d 662 (1965); *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 300; 616 NW2d 175 (2000). The objection must specifically state the objectionable matter and the ground for the objection. MCR 2.516(C), *Hammack v Lutheran Social Services*, 211 Mich App 1, 10; 535 NW2d 215 (1995). Defendant did not request an instruction on or object to the trial court's failure to instruct the jury that no crosswalk existed, as matter of law, at the Jefferson and Riopelle intersection, and thus, this issue is not preserved for appellate review.[4] Failure to timely and specifically object precludes appellate review absent a showing of plain error that affected the claimant's substantial rights, i.e., plaintiffs must show a clear or obvious error that affected the outcome of the case. *Shinholster Est v Annapolis Hospital*, 255 Mich App 339, 350; 660 NW2d 361 (2003); *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

Regardless of whether there was a crosswalk at the intersection of Jefferson and Riopelle, there was no error that affected the outcome of the trial. The jury was not instructed that the intersection at Jefferson and Riopelle was a crosswalk. Defendant never requested that the jury be instructed that the intersection of Riopelle and Jefferson was not a crosswalk. The only reason for a crosswalk instruction would be comparative negligence. Pedestrians crossing outside of a crosswalk face the hurdle of comparative negligence. See *Mason v Wayne Co Bd of Comm'rs*, 447 Mich 130, 137; 523 NW2d 791 (1994). The jury found that decedent was twenty-five percent negligent. Additionally, defendant never contended that it made a difference whether or not plaintiff was in a crosswalk, and the question was whether defendant was negligent. For this reason, there was no plain error that affected defendant's substantial rights.

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[4] In the event defendant is arguing that the trial court made an erroneous evidentiary ruling, the issue is still not preserved for appeal because defendant failed to timely object to the trial court's determination regarding this issue. *Hammack, supra*, 211 Mich App 7. Plaintiff filed a motion in limine requesting that the trial court rule as a matter of law that the intersection of Jefferson and Riopelle was a crosswalk, and to not allow defendant to introduce testimony to the contrary. At the motion hearing, defendant appeared to argue proof that this area was not a crosswalk comes from how people are using it, thus, implying it was a factual claim. Defendant did not object to the trial court's ruling denying plaintiff's motion in limine and allowing the parties to introduce evidence on the issue of whether a crosswalk existed at the intersection of Riopelle and Jefferson. Defendant did motion on the record for a directed verdict that the intersection of Riopelle and Jefferson was not a crosswalk at the close of plaintiff's case, but did not pursue this motion. Accordingly, the issue has not been preserved for appeal.

Defendant's second issue on appeal is that a new trial is required because the trial court legally erred in interpreting the emergency statutes, MCL 257.603 and MCL 257.632, in a manner which permitted the jury to infer negligence from violation of the statutes inconsistent with Michigan law. We disagree.

Whether to grant a new trial is in the trial court's discretion, and this Court will not reverse a trial court's decision absent a clear abuse of that discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001); *Setterington v Pontiac General Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997). An abuse of discretion occurs when the decision was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias, *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34-35; 609 NW2d 567 (2000), or the trial court misapplied or misunderstood the law, *Bynum v ESAB Group, Inc*, 467 Mich 280, 283; 651 NW2d 383 (2002). MCR 2.611(A) provides, in relevant part, that a new trial may be granted on all or some of the issues when the substantial rights of a party were materially affected and there was:

> (a) Irregularity in the proceedings of the court, jury, or prevailing party, or an order of the court or abuse of discretion which denied the moving party a fair trial.
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> (b) Misconduct of the jury or of the prevailing party.
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> (c) Excessive or inadequate damages appearing to have been influenced by passion or prejudice.
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> (d) A verdict clearly or grossly inadequate or excessive.
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> (e) A verdict or decision against the great weight of the evidence or contrary to law.
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> * * *
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> (g) Error of law occurring in the proceedings, or mistake of fact by the court. . . .

On appeal, claims of instructional error are generally reviewed de novo, *Cox v Flint Bd of Hospital Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002), although a trial court's determination whether a standard instruction was applicable and accurate is reviewed for an abuse of discretion, *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997), its determination whether an instruction is supported by the evidence is entitled to deference, *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 339; 657 NW2d 759 (2002), and a determination based upon a legal issue is a question of law subject to a de novo review, *Jackson v Nelson*, 252 Mich App 643, 647; 654 NW2d 604 (2002). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would have concluded that there was no justification or excuse for the ruling made. *Clark v Kmart Corp (On Remand)*, 249 Mich App 141, 151; 640 NW2d 892 (2002). Jury instructions should be reviewed in their entirety, rather than extracted piecemeal to establish error in isolated portions. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000); *Bachman v Swan Harbour Association*, 252 Mich App

400, 424; 653 NW2d 415 (2002). Reversal is not required unless the failure to do so would be inconsistent with substantial justice. MCR 2.613(A), *Case*, *supra*, 463 Mich 6. There is no reversible error if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997); *In re Flury Estate*, 249 Mich App 222, 226; 641 NW2d 863 (2002).

The trial court granted plaintiff's motion in limine to declare that Officer Scott violated the law by exceeding the speed limit and by driving in the center turn lane without his sirens and/or flashers on. Defendant argues that the trial court erred in this ruling, and improperly instructed the jury on the matter. Regardless of the trial court's ruling, both parties presented testimony throughout the trial with regard to whether Officer Scott violated the emergency vehicle statutes MCL 257.603 and MCL 257.632. The trial court instructed the jury on this matter as follows:

> [T]his Court has previously determined that the Defendant's agent, Fred Scott, violated the state statutes by speeding and driving down the center left turn lane without using his flashers and/or siren. Since the issue has already been decided you may infer that Defendant was negligent as to these facts.
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> * * *
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> We have a state statute which provides that police officers may disregard speed limitations when traveling on emergencies, in a chase or apprehension of persons suspected of a violation. However the speed exemption only applies when the lights and sirens are operating unless the nature of the mission requires that a law enforcement officer travel without giving warning to suspected law violators. Also the exemption does not protect the driver of the vehicle from the consequence of a reckless disregard for the safety of others.
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> If you find that Officer Scott violated this statute before or at the time of the occurrence you may infer that he was negligent. You must then decide whether such negligence was the proximate cause of the occurrence. However, if you find that Officer Scott used ordinary care and was still unable to avoid the violation because compliance would involve a greater risk of harm to him and others, then his violation is excused. Also, if you find he has conformed by – excuse me, that he was confronted by an emergency not due to his own misconduct, then his violation is excused.

The jury instructions, when viewed in their entirety, are consistent with Michigan law. MCL 257.603 provides in pertinent part:

> (2) The driver of an authorized emergency vehicle when responding to an emergency call, but not while returning from an emergency call, or when pursuing or apprehending a person who has violated or is violating the law or is charged with or suspected of violating the law may exercise the privileges set forth in this section, subject to the conditions of this section.
> (3) The driver of an authorized emergency vehicle may do any of the following:

* * *

(c) Exceed the prima facie speed limits so long as he or she does not endanger life or property.

(d) Disregard regulations governing direction of movement or turning in a specified direction.

(4) The exemptions granted in this section to an authorized emergency vehicle apply only when the driver of the vehicle while in motion sounds an audible signal by bell, siren, air horn, or exhaust whistle as may be reasonably necessary, except as provided in subsection (5), *and when the vehicle is equipped with at least 1 lighted lamp displaying a flashing, oscillating, or rotating red or blue light* visible under normal atmospheric conditions from a distance of 500 feet in a 360 degree arc unless it is not advisable to equip a police vehicle operating as an authorized emergency vehicle with a flashing, oscillating or rotating light visible in a 360 degree arc. In those cases, a police vehicle shall display a flashing, oscillating, or rotating red or blue light visible under normal atmospheric conditions from a distance of 500 feet to the front of the vehicle. Only police vehicles that are publicly owned shall be equipped with a flashing, oscillating, or rotating blue light that when activated is visible under normal atmospheric conditions from a distance of 500 feet in a 360 degree arc.

(5) A police vehicle shall retain the exemptions granted in this section to an authorized emergency vehicle without *sounding an audible signal* if the police vehicle is engaged in an emergency run in which silence is required.

(6) The exemptions provided for by this section apply to persons, teams, motor vehicles, and other equipment while actually engaged in work upon the surface of a highway but do not apply to those persons and vehicles when traveling to or from work. The provisions of this chapter governing the size and width of vehicles do not apply to vehicles owned by public highway authorities. [Emphasis Added.]

With regard to MCL 257.603, Officer Scott was required to have his "equipped" lights on. It is recognized that there was testimony that Officer Scott had on his factory hazard lights, but by his own admission he did not have on the emergency lights that his vehicle was equipped with. Thus, there is a question as to whether factory hazardous lights are proper under the emergency vehicle exemption statute, MCL 257.603.

Statutory interpretation is a question of law which is considered de novo on appeal. *Eggleston v Bio-Medical Applications of Detroit, Inc*, ___ Mich ___; 658 NW2d 139 (Docket No. 121208, decided 3/26/03) slip op p 4. The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mutual Ins v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998); *Ross v State*, 255 Mich App 51, 55; ___ NW2d ___ (2003). If the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999); *Toth v AutoAlliance International* (On Remand), 246 Mich App 732, 737; 635 NW2d 62 (2001). As far as possible, effect should be given to every

sentence, phrase, clause and word. *Pohutski v Allen Park*, 465 Mich 675, 684; 641 NW2d 219 (2002); *Sun Valley Foods Co, supra*, 460 Mich 237.

The intention of the statute was to exempt an authorized emergency vehicle when its emergency equipment was on including its sound equipment and its emergency light equipment. The language "is equipped with" in MCL 257.603(4) indicates that the light is one other than a factory hazardous light. Further, the exemption in MCL 257.603(5) applies only to the an "audible signal." Random House Webster's College Dictionary (1997) states that "audible" means: "of pertaining to, or affecting the auditory nerves or the sense of hearing." Thus, Officer Scott would not be exempted from the prima facia speed limit and be authorized to disregard other traffic regulations pursuant to MCL 257.603 because he did not turn on the emergency lights his patrol car was equipped with. Therefore, the trial court did not err in finding as a matter of law that Officer Scott violated a state statute by driving in the center left turn lane without using his flashers and/or siren. Regarding the speed limit, the jury was instructed that if Officer Scott was confronted by an emergency not due to his own misconduct that the violation would be excused. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial in this regard.

With regard to the speed limitation, MCL 257.632 of the Motor Vehicle Code provides:

> The speed limitation set forth in this chapter shall not apply to vehicles when operated with due regard for safety under the direction of the police when traveling in emergencies or in the chase or apprehension of violators of the law or of persons charged with or suspected of a violation, nor to fire department or fire patrol vehicles when traveling in response to a fire alarm, nor to public or private ambulances when traveling in emergencies. This exemption shall apply only when the driver of the vehicle while in motion sounds an audible signal by bell, siren or exhaust whistle as may be reasonably necessary or when the vehicle is equipped with at least 1 lighted lamp displaying a flashing, oscillating or rotating red or blue light visible under normal atmospheric conditions from a distance of 500 feet to the front of such vehicles, unless the nature of the mission requires that a law enforcement officer travel without giving warning to suspected law violators. This exemption shall not however protect the driver of the vehicle from the consequences of a reckless disregard of the safety of others.

Defendant contends that whether or not Officer Scott's conduct violated the emergency vehicle statutes was question of law that should be submitted to the jury. The jury was instructed on this statute as quoted, *supra*. The existence of an emergency or circumstances warranting the reasonable belief that an emergency exists which will exempt the driver of an authorized vehicle from observing traffic regulation is a question of fact. *Fiser v Ann Arbor*, 417 Mich 461, 471-472; 339 NW2d 413 (1983), overruled on other grounds *City of Detroit v Robinson*, 462 Mich 439; 613 NW2d 307 (2000). This question was properly presented to the jury, which was instructed that Officer Scott's violation could be excused if he was confronted by an emergency that was not the result of his own misconduct and he did not show a reckless disregard for the safety of others.

The trial court did not deny either party the opportunity of presenting evidence of whether Officer Scott violated the emergency vehicle statutes. The trial court instructed the jury

that negligence "may" be inferred because defendant violated state statutes by speeding and driving down the center lane, but also informed the jury, on MCL 257.632, that Officer Scott would be excused from violating the speed limitations provided he was on an emergency that required silence. Reversal is not required because when reviewing the instructions in their entirety, the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Murdock, supra*, 454 Mich 60; *Flury, supra*, 249 Mich App 226. The trial court instructed the jury that Officer Scott violated a state statute, as he admittedly did, and instructed that the jury may infer negligence. However, when the instructions are read as whole, the jury is then instructed that Officer Scott was excused from violating the state statute if he was on an emergency run and if he did not show a reckless disregard for the safety of others. Therefore, the trial court was instructed that plaintiff had violated a state statute, negligence may be inferred, but if the jury found that his violation came within the parameters of MCL 257.632 his violation was excused. Error only exists when the instructions are extracted piecemeal. See *Case, supra*, 463 Mich 6. Consequently, there was no error and a new trial is not warranted as the instructions given were consistent with Michigan law. It is also noted, that all of the evidence from defendant's experts that Officer Scott's conduct was within the protections of the emergency vehicle statutes was presented to the jury. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial in this regard.

Defendant's third issue on appeal is that a new trial is required because the trial court allowed the jury to consider conscious pain and suffering although no fact witnesses testified that decedent was conscious after the accident and plaintiff's expert should not have been permitted to testify that decedent was conscious for approximately four to six minutes because his testimony was not based on recognized scientific knowledge.[5] We disagree.

Defendant argues that the trial court erred in permitting argument on and instructing the jury on damages for conscious pain and suffering. The Wrongful Death Act, MCL 600.2922(6) provides, in pertinent part, as follows:

> In every action under this section the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased.

Thus, the statute allows damages for conscious pain and suffering of the deceased following an injury and prior to death. See *Meek v Department of Transportation*, 240 Mich App 105, 121-122; 610 NW 2d 250 (2000).

[5] As noted, *supra*, whether to grant a new trial is in the trial court's discretion, and this Court will not reverse a trial court's decision absent a clear abuse of that discretion. *Kelly, supra*, 465 Mich 34; *Setterington, supra*, 223 Mich App 608.

Conscious pain and suffering can be '"inferred from other evidence that does not explicitly establish the fact.'" *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 461; 633 NW2d 418 (2001) quoting *Byrne v Schneider's Iron & Metal, Inc*, 190 Mich App 176, 180-181, 475 NW2d 854 (1991). In *Meek, supra*, 240 Mich App 122, this Court upheld an award of damages for conscious pain and suffering when there was evidence to infer consciousness in the "initial moments of the accident."

Decedent was struck by Officer Scott's patrol car, went up in the air, and landed hitting her head on the street. The evidence suggests that the initial impact, which sent decedent in the air, was with her lower extremities. There is no dispute that decedent was in the air for a short period of time from when she was struck until when she landed on the ground. Dr. Spitz testified that decedent would have experienced conscious pain and suffering for four to six minute subsequent to when she was initially struck because the head impact would have caused her brain to swell causing her to lose consciousness progressively over a four to six minute period. Dr. Cassin, defendant's expert, testified that decedent would have lost consciousness on impact with the ground, but would have likely experienced conscious pain and suffering from the time she was struck by the patrol car until when her head struck the ground.

A conscious pain and suffering instruction was proper in light of Dr. Spitz's testimony and Dr. Cassin's testimony which suggests that decedent, at the very least, suffered conscious pain and suffering from the time she was hit by the patrol car until she struck the ground. This Court in *Meek, supra*, suggested that "initial moments" would be enough to uphold a finding of conscious pain and suffering. From the evidence, in particular the evidence that is not in dispute, the jury could have inferred reasonably that the decedent suffered conscious pain and suffering at least for a few seconds. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial with regard to instructing the jury on conscious pain and suffering. [6]

Defendant's fourth issue on appeal raises several instances of alleged prejudical misconduct that defendant contends requires a new trial.[7] We disagree.

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[6] In light of our finding that the jury was properly instructed as to conscious pain and suffering, it is unnecessary for this Court to address whether Dr. Spitz's expert testimony was properly admitted. Regardless of whether Dr. Spitz's testimony regarding the progressive loss of consciousness was admissible, a conscious pain and suffering instruction was proper, as all of the expert testimony indicates that there was at least conscious pain and suffering from the initial impact until decedent hit the ground. Defendant's substantial rights and the outcome of the trial were not affected because as determined, *supra*, defendant's experts even agreed that there was a short time period of conscious pain and suffering, and therefore, any error was harmless. Further, defendant had an opportunity to, and did, cross-examine and attempt to discredit Dr. Spitz's testimony.

[7] As noted, *supra*, whether to grant a new trial is in the trial court's discretion, and this Court will not reverse a trial court's decision absent a clear abuse of that discretion. *Kelly, supra*, 465 Mich 34; *Setterington, supra*, 223 Mich App 608.

In *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982), our Supreme Court set forth the following rules for analysis of an attorney misconduct claim:

> When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted.

Furthermore, an attorney's comments during trial warrant reversal where "they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 191-192; 600 NW2d 129 (1999). When unpreserved this Court may take notice of plain errors if they affect a party's substantial rights. *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 637; 601 NW2d 160 (1999).

Defendant first contends that there was prejudicial misconduct on the part of plaintiff's counsel in offering testimony with regard to decedent's loss of accumulated wealth pursuant to the Wrongful Death Act, which he later withdrew. Plaintiff's counsel made an argument to the trial court, that accumulated wealth damages could be awarded under MCL 600.2922, which provides in relevant part "the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances." Plaintiff's counsel also argued that the standard jury instructions supported that damages could be presented to the jury that were not specifically included because SJI 2d 45.02 includes open spaces to fill in other damages. The trial court agreed with plaintiff's counsel and allowed the introduction of testimony as to accumulated wealth. It is not necessary to address the merits of plaintiff's claim, but it did not amount to error as there was some merit behind plaintiff's request. Plaintiff's counsel was arguing from the wording of the statute, and did not do anything improper. Moreover, plaintiff's arguments for accumulated wealth damages did not indicate a deliberate course of conduct aimed at preventing a fair and impartial trial and did not deflect the jury's attention from the issues involved or have controlling influence on the verdict. *Ellsworth, supra*, 236 Mich App 191-192. Thus, there was no error with regard to plaintiff's counsel arguing that accumulated wealth damages were proper.[8]

Defendant next argues that plaintiff's counsel committed prejudicial misconduct by announcing to the jury that Officer Scott was engaged in phone sex and by displaying a blow up

[8] With regard to whether a limiting instruction was proper when plaintiff's counsel withdrew the request, this issue is waived on appeal because defendant failed to request a mitigating instruction at trial. *Leavitt, supra,* 241 Mich App 300.

business card. There was some discussion on the record about certain exhibits and the following statements were made with regard to an exhibit:

The Court: Could I see that?

Mr. Fieger: (Proffering to the Bench)

* * *

The Court: What is this indicative of?

Mr. Fieger: It's a phone sex card, Judge. What's is a policeman - ?

The Court: Oh, it is?

Mr. Fieger: Yes, it is Judge. He admits that he knows the owner of the card, Judge. We deposed him on it and he admits he knows the owner of that card.

Shortly thereafter, the matter was taken up outside of the presence of the jury, and defendant made a request for a mistrial. Defendant misrepresents that plaintiff's counsel announced to the jury that Officer Scott was engaged in phone sex, when all that was said in the presence of the jury was that a phone sex card was found and that "he" knows the owner. Moreover, a review of the transcript reveals that plaintiff's counsel was "Proffering to the Bench" prior to when the comments were made, thus, suggesting that the comments were not even made in a manner that they could be heard by the jury. Officer Scott was never mentioned as the owner of the card in the presence of the jury, and there is nothing that amounted to an error. Furthermore, the comments made by plaintiff's counsel did not indicate a deliberate course of conduct aimed at preventing a fair and impartial trial and did not deflect the jury's attention from the issues involved or have controlling influence on the verdict. *Ellsworth, supra,* 236 Mich App 191-192. This was not deliberate on the part of plaintiff's counsel because the issue of the business card was raised when the trial court asked plaintiff's counsel a question, and all that was said is that it was a phone sex card and "he" knows the owner. Nor did it have a controlling influence on the verdict. Thus, plaintiff counsel's conduct was not improper in this regard. Further, any error was cured by the trial court's twice instructing the jury that comments or remarks by counsel were not to be considered evidence. *Reetz, supra,* 416 Mich 106.

Defendant next asserts that plaintiff's counsel gratuitously injected race into the trial in an effort to discredit unfavorable testimony by Michael O'Brien. Specifically, the colloquial between plaintiff's counsel and O'Brien went as follows:

Q. (By Mr. Fieger) You're like the type of guy who likes to help the police, right?

Mr. Liedel: Objection.

* * *

Q. (By Mr. Fieger) Well now you didn't want to get out of the car because you were afraid of all of the black people in the street?

Mr. Liedel: Oh, objection, Your Honor.

The Court: Sustained.

Q. (By Mr. Fieger) Wait a second. Didn't you give a statement to the Detroit Police saying you were afraid of people being in the street?

* * *

Q. (By Mr. Fieger) Did you give a statement to the Detroit Police that - - because of the hostility of the crowd directed at the officer who was black as well as the crowd which was basically black, you feared for your safety and the safety of your passengers? Is that your- is that your -

A. That is accurate and that is what I said. That is correct.

Q. Now – and maybe – okay, so you were afraid of the crowd because they were black?

* * *

Q. . . . . What does being black have to do with anything?

A. It has nothing to do with being black. Black – what I was hearing was all of those negative responses toward the black police officer. It didn't have any bearing on everybody there being black. The point was that the incident was getting heated because it was a Detroit Police Officer.

Because plaintiff did not request a specific instruction or a mistrial on this point of alleged error, this issue was not preserved for appeal. *Reetz, supra*, 416 Mich 100-102. However, under MRE 103(d), this Court may take notice of plain errors if they affect a party's substantial rights. *Kubisz, supra,* 236 Mich App 637.

Counsel may not as a deliberate strategy incite jurors to punish defendant for bigotry rather than consider the facts. See *Powell v St John Hospital*, 241 Mich App 64, 79; 614 NW2d 666 (2000). Further, "[c]ounsel is not entitled to belittle a witness." *Powell, supra,* 241 Mich App 80. Counsel may comment on a witness' bias. *Reetz, supra*, 416 Mich 109. In the present case, plaintiff's counsel was not deliberately attempting to incite the jury based on bigotry, as the comments were made in cross-examining a witness and were to impeach as to credibility. Both decedent and Officer Scott were African-American, which stands as another reason why defendant's argument lacks merit. Further, the cross-examination conducted by plaintiff's counsel did not amount to belittling the witness. Plaintiff's counsel was attempting to impeach testimony that supported defendant by cross-examining O'Brien, a defense witness, with a prior statement, which had tendency to make it less probable that the witness had a good view of the events. O'Brien was testifying to events that took place at the accident scene, and as to the investigation which were all key points to the credibility of defendant's version of the incident, and cross-examining a witness with a prior statement was not error in this situation. Furthermore, the comments made by plaintiff's counsel did not indicate a deliberate course of

conduct aimed at preventing a fair and impartial trial, did not deflect the jury's attention from the issues involved, and did not have a controlling influence on the verdict. *Ellsworth, supra*, 236 Mich App 191-192. Therefore, there was no error in the conduct of plaintiff's counsel in this regard.

Defendant also argues that plaintiff's counsel committed prejudicial misconduct by suggesting that the Detroit Police Department failed to contact decedent's family and failed to go to decedent's aid. On redirect examination of Tracy Shaw, decedent's sister, plaintiff's counsel asked "If I were to tell you that the City of Detroit in this lawsuit has spent thousands of hours fighting your family and not one hour investigating -." Defense counsel immediately objected, and it was sustained. On re-cross examination of Donna Hoban, plaintiff's counsel asked "Would you please explain to me why the person who hit her [decedent] didn't feel the same sense of obligation [to give help]?" The trial court immediately informed the witness that she did not have to answer the question. Plaintiff's counsel then asked "did you feel that excused him from at least seeing if there was something he could do." Once again the trial court directed the witness that she did not have to answer the question. Because plaintiff did not request a specific instruction or a mistrial on these points of alleged error, this issue was not preserved for appeal. *Reetz, supra*, 416 Mich 100-102. However, under MRE 103(d), this Court may take notice of plain errors if they affect a party's substantial rights. *Kubisz, supra*, 236 Mich App 637.

These comments are arguably relevant and an attempt to influence the jury to believe plaintiff's witnesses. The comments are also arguably deliberate and inflammatory. In particular, the first comment regarding defendant spending money defending the lawsuit, but not investigating the accident was an inflammatory comment. There was conflicting testimony regarding the Detroit Police Department investigation. Where there is conflicting testimony, counsel may try to persuade the jury to believe counsel's witness and disbelieve the opposing counsel's witness. *Kubisz, supra*, 236 Mich App 641. Here, the comments were not proper, but the trial court immediately stopped plaintiff. The remarks noted by defendant did not have the effect of denying it a fair and impartial trial. *Reetz, supra*, 416 Mich 102-103. Even though the comments may have been erroneous any error was cured by the trial court's immediately stopping plaintiff's counsel and twice instructing the jury that comments or remarks by counsel were not to be considered evidence. *Reetz, supra*, 416 Mich 106.

On cross-examination of Sergeant Turner, plaintiff's counsel began asking questions regarding whose responsibility it was to contact the victim's family. This questioning was not objected to by defendant, and thus, is reviewed for plain error. *Kubisz, supra*, 236 Mich App 637. There was evidence of some improprieties in the investigation by the Detroit Police Department, and evidence that Braswell informed the police of who decedent was. Therefore, the evidence was somewhat relevant to defendant and Officer Scott's credibility. Further, any error was cured by the trial court's twice instructing the jury that comments or remarks by counsel are not to be considered evidence. *Reetz, supra*, 416 Mich 106.

Defendant further asserts that plaintiff's counsel committed what amounted to prejudicial misconduct by referencing a cover up without a factual foundation and involving issues not relevant to the action. Defendant also asserts that these comments and this line of questioning was not permitted because this was a negligence claim and any references to the Detroit Police Department's investigation was an attempt to inflame the jury. During opening statements plaintiff's counsel stated that "You're also going to hear evidence of cover-up and the

misrepresentations and the falsehoods directly from Scott." Because plaintiff did not request a specific instruction or a mistrial on this point of error, this issue was not preserved for appeal. *Reetz, supra*, 416 Mich 100-102. However, under MRE 103(d), this Court may take notice of plain errors if they affect a party's substantial rights. *Kubisz, supra*, 236 Mich App 637.

This statement was not improper. Counsel may comment on a witness' bias. *Reetz, supra*, 416 Mich 109. It is proper to claim fabrication where the testimony of a plaintiff's witness directly contradicts a defendant's witness. *Id*. Also, where there is conflicting testimony, counsel may try to persuade the jury to believe counsel's witness and disbelieve the opposing counsel's witness. *Kubisz, supra*, 236 Mich App 641. Clearly, Officer Scott's testimony regarding the events surrounding the accident contradicted that of various plaintiff witnesses. Defense counsel's remarks were within the bounds of proper argument. There was evidence introduced that the Detroit Police Department may have covered things up, plaintiff's witnesses and some defense witnesses testified contrary to Officer Scott. Moreover, the comments made by plaintiff's counsel did not indicate a deliberate course of conduct aimed at preventing a fair and impartial trial, did not deflect the jury's attention from the issues involved, and did not have a controlling influence on the verdict. *Ellsworth, supra*, 236 Mich App 191-192. Thus, the statements were not improper.

The examination of Nelson McMillan was proper with regard to questioning the investigation by the police department. Because plaintiff did not request a specific instruction or a mistrial on this point of error, this issue was not preserved for appeal. *Reetz, supra*, 416 Mich 100-102. However, under MRE 103(d), this Court may take notice of plain errors if they affect a party's substantial rights. *Kubisz, supra*, 236 Mich App 637. This argument and line of questioning was proper and permitted as defendant's defense was that Officer Scott was on an emergency run in pursuit of a blue Cadillac and that a U-turn was made. Credibility was an important issue regarding the surrounding circumstances. Where there is conflicting testimony, counsel may try to persuade the jury to believe counsel's witness and disbelieve the opposing counsel's witness. *Kubisz, supra*, 236 Mich App 641. Thus, there was no error in plaintiff's examination of McMillan.

Additionally, defendant contends that plaintiff's counsel made statements referencing defendant's power and its status as a corporation and impermissibly implored the jurors to put themselves in plaintiff's shoes and made a "golden rule" argument. However, as pointed out in plaintiff's brief on appeal there is no cite to the record in defendant's argument for these alleged statements. Further, defendant fails to cite the factual basis for these arguments in its reply brief. "A party may not leave it to this Court to search for a factual basis to sustain or reject its position." *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 424; 576 NW2d 667 (1998). Therefore, appellate review of this issue is precluded.

Since any errors or irregularities during the trial were not of consequence, there was no cumulative error or irregularities that denied defendant a fair trial. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial with regard to misconduct and irregularities.

Defendant's final issue on appeal is that the case evaluation sanctions award should be overturned because it is predicated upon duplicative attorney work at a rate which far exceeds that allowed under the rule. We disagree.

A trial court's interpretation of the court rule and decision to award case evaluation sanctions are reviewed de novo as questions of law. *Marketos v American Employers Ins Co*, 465 Mich 407, 412; 633 NW2d 371 (2001); *Elia v Hazen*, 242 Mich App 374, 376-377; 619 NW2d 1 (2000). The amount of case evaluation sanctions awarded is reviewed for an abuse of discretion. *Elia, supra*, 242 Mich App 377. A party who rejects an evaluation is subject to sanctions if he fails to improve his position at trial. *Elia, supra*, 242 Mich App 378. If sanctions are appropriate, the actual costs to be charged are the costs taxable in any civil action plus a reasonable attorney fee. MCR 2.403(O)(6), *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 81; 577 NW2d 150 (1998). Determination of the rate for fees to include in a sanction is in the trial court's discretion, *Zdrojewski v Murphy*, 254 Mich App 50, 73; 657 NW2d 721 (2002), and this Court will uphold the determination of the amount of the award absent an abuse of discretion, *Elia, supra*, 242 Mich App 377. An abuse of discretion occurs only if the trial court's decision was grossly violative of fact and logic, *Michigan Basic Property Ins v Hackert Furniture*, 194 Mich App 230, 234; 486 NW2d 68 (1992), or it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *Elia, supra*, 242 Mich App 377.

The trial court awarded $946.65 in taxable costs and awarded plaintiff's attorneys $213,800 as follows: Attorney Geoffrey Fieger $119,550 (199.25 hours x $600 per hour), Attorney Marcia McClure $59,750 (239 x $250 per hour) and Attorney Henry Langberg $34,500 (138 hours x $250 per hour). Defendant contends that it is not reasonable to charge defendant expenses associated with the presence of extra counsel at trial and during depositions. A reasonable attorney fee must be based on a reasonable hourly or daily rate, as determined by the trial judge, for services necessitated by the rejection of the evaluation. MCR 2.403(O)(6)(b), *Rafferty v Markovitz*, 461 Mich 265, 267; 602 NW2d 367 (1999). Reasonable fees can include fees incurred through representation by multiple lawyers. *Attard v Citizens Ins Co*, 237 Mich App 311, 329-330; 602 NW2d 633 (1999).

The trial court held a hearing on the case evaluation sanctions matter and released a detailed opinion with its findings. After a thorough examination of the record, the trial court did not abuse its discretion in awarding attorney fees to Attorney McClure, Attorney Fieger, and Attorney Langberg. Attorney Fieger testified at the motion hearing that if it were not for the time spent by co-counsel he would have been required to spend the extra hours on the case, which would have, obviously, been more costly for defendant. Defendant argues that it was unreasonable for Attorney McClure and Attorney Langberg to be present at the trial when Attorney Fieger tried the case in its entirety. However, Attorney McClure and Attorney Langberg represented plaintiff prior to Attorney Fieger's involvement, and therefore, conducted a great deal of the discovery. Thus, their presence at trial and assistance in depositions was necessary to Attorney Fieger who joined the case just prior to case evaluation. Based on the vast number of witnesses, the complexity of the case, and the fact that Attorney Fieger did not begin his representation until just before case evaluation the trial court did not abuse its discretion in granting attorney fees to all three attorneys. *Elia, supra*, 242 Mich App 376-377; See *Attard, supra*, 237 Mich App 329-330.

Defendant argues that Attorney Fieger's hourly rate of $600 was unreasonable. In determining a reasonable hourly or daily rate, the trial court can take into consideration some of the following: (1) the professional standing and experience of the lawyer; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case;

(5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. *Zdrojewski*, *supra*, 254 Mich App 72; *Temple v Kelel Distributing Co*, 183 Mich App 326, 333; 454 NW2d 610 (1990); *Jernigan v General Motors Corp*, 180 Mich App 575, 587; 447 NW2d 822 (1989). Defendant does not question Attorney Fieger's professional standing and experience as a lawyer. This case was clearly more than a "garden-variety auto negligence case" as defendant indicates in its brief. Further, the result received achieved is also a factor and a verdict of $7,000,000 was awarded when defendant had, apparently, only offered $600,000. Under these circumstances, the trial court did not abuse its discretion in awarding the $600 per hour fee requested by Attorney Fieger.

Defendant, in its brief on appeal, argued that the trial court awarded unreasonable expert witness fees. Plaintiff's brief on appeal pointed out that the trial court had not awarded expert witness fees, and thus, plaintiff requested that defendant be sanctioned under MCR 7.216(C)(1)(b). Defendant's reply brief on appeal notes that it inadvertently included the discussion on expert witness fees. This Court may, upon motion of a party or its own initiative, impose sanctions on a party who pursued a vexatious appeal or a vexatious proceeding in an appeal. MCR 7.216(C)(1), *DeWald v Isola (After Remand)*, 188 Mich App 697, 700; 470 NW2d 505 (1991). An appeal is vexatious when it is taken for purposes of hindrance or delay or without any reasonable basis for belief that there is a meritorious issue to be determined on appeal. MCR 7.216(C)(1)(a), *Richardson v DAIIE*, 180 Mich App 704, 709; 447 NW2d 791 (1989). A proceeding is vexatious when a pleading, motion, argument, brief, document or record filed or any testimony presented is grossly lacking in the requirements of propriety, violates court rules, or grossly disregards the requirements of a fair presentation of the issues to the court. MCR 7.216(C)(1)(b). Based on the record and the complexity of this case there is no reason not to believe that defendant inadvertently included the argument regarding expert witness fees. MCR 7.216(C) uses the term "may" in that it is within this Court's discretion. Though the basis may exist in this case for sanctions, under the circumstances we will not impose sanctions.

Affirmed.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Karen Fort Hood